

1                                   **BEFORE THE SHORELINES HEARING BOARD**  
2                                   **STATE OF WASHINGTON**

3       **MARK R. WEINBERG,**                                   )

4                                   **Appellant.**                                   )

5                                   **v.**                                   )

6       **WHATCOM COUNTY and STATE OF**                                   )  
7       **WASHINGTON, DEPARTMENT OF**                                   )  
8       **ECOLOGY,**                                   )

**Respondents.**                                   )  
                                 \_\_\_\_\_)                                   )

**SHB NO. 93-2**

**FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER**

9                   The Shorelines Hearings Board ("Board") heard this matter on November 10, 1993, in  
10                   Bellingham, Washington. The Board was comprised of: Robert V. Jensen, attorney member,  
11                   presiding; Richard C. Kelley; Bobbi Krebs-McMullen; Mike Morton and Mark Erickson,  
12                   members.

13                   Appellant, Mark Weinberg ("Weinberg") was represented by his attorney, Robert A  
14                   Carmuchal. Whatcom County ("County") was represented by Deputy Prosecuting Attorney,  
15                   Randall J. Watts. The Department of Ecology was represented by Assistant Attorney General,  
16                   Mark Jobson.

17                   Court reporter, Leslie Andres, affiliated with Bartholomew, Moughton & Associates of  
18                   Everett, recorded the proceedings

19                   The Board heard the sworn testimony of witnesses, reviewed the exhibits and listened  
20                   to the closing arguments of the parties. The Board viewed the property as an aid to  
21                   understanding the evidence. Based on its review, the Board makes these:  
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27       **FINAL FINDINGS OF FACT.  
CONCLUSIONS OF LAW AND ORDER  
SHB NO. 93-2**

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## FINDINGS OF FACT

### I

Emerald or Toad Lake is a small lake which is situated above and east of Lake Whatcom. in Whatcom County. Most of the land around the lake was platted into residential lots in 1959. The Emerald Lake Property Owners' Association ("Owners' Association") presently is comprised of 326 persons owning lots on and near the lake. Approximately 125 lots are occupied by permanent or part-time dwellings. About 50% of the lots on the lake are used for recreational purposes. The Owners' Association owns property near the northeast corner of the lake, which is utilized by the members and their guests for recreation.

### II

The owners of the development, shortly after the platting, created a 20 foot road easement below a bluff along the southeasterly shore. They immediately built a 10 foot dirt road and sold off lots landward thereof by deed, without going through a further subdivision process. The road is not built to County standards. Above the bluff is a terrace which is adjacent to the County road that parallels the lake shore.

### III

The lake is not served by sewer, so the residential structures in the area utilize on-site drainage systems. Domestic water is available.

### IV

The County, in 1976, adopted its shoreline master program ("WCSMP"), pursuant to the Shoreline Management Act ("SMA") It was approved by Ecology in August 1976 The WCSMP designated the Emerald Lake shorelines as a Rural Shoreline Area. The lake is posted as being restricted to non-motorized boats The WCSMP established a minimum shoreline setback for single family residences. from the ordinary high water mark, of 45 feet

1 The setbacks for decks was established at 25 feet. The maximum height allowable was 25  
2 feet; it now is 30 feet. The minimum lot size, under County zoning, is 18,000 square feet.  
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#### 4 V

5 Weinberg lives on lot 29 above the lake and the County road, on the southerly side of  
6 the lake. He has lived there for 13 years, since 1980. He is a sophisticated land purchaser,  
7 owning currently 25 to 30 lots in the area. In 1990, he purchased an approximately 6,000  
8 square foot water-front lot (exclusive of the easement) on property, with the intent of building  
9 a permanent home for himself and his parents. The southeast boundary of the lot is the upland  
10 edge of the 20 foot right-of-way easement. The lot is approximately 120 feet long (paralleling  
11 the shore), by 49 feet at the southeast corner, and 51 feet at the northeast corner. He paid  
12 \$10,000 for the lot. This is at the low end of the \$8,000 to \$35,000 price range for water-  
13 front lots on the lake. In 1991, he and his brother purchased the adjacent upland property,  
14 between the road easement and the County road.

#### 15 VI

16 The dirt road is within the easement right-of-way at the southeast corner of Weinberg's  
17 lot, but veers shoreward from there, going northeasterly, such that the southeast corner of the  
18 easement and lot is between 15 and 20 feet southeasterly of the upland edge of the dirt road.  
19 The bluff rises from about this point, such that there are no apparent topographical barriers to  
20 relocating the road within the easement.

#### 21 VII

22 Weinberg submitted a shoreline variance permit application to the County for a 35 foot  
23 high residential structure, including a deck, in June 1992. This would require a 10 foot  
24 variance from the maximum height allowed at that time. His application would require  
25 placing the structure 15 feet upland of the ordinary high water mark, which would be a  
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1 variance of 30 feet from the required 45 foot setback. The deck was proposed to be 10 feet  
2 from the shore, instead of the required 25 feet. In front of the deck, Weinberg proposes to  
3 leave a 10 foot vegetative strip, comprised mainly of ivy, salmon berry, blackberry, and sword  
4 ferns. The footprint of the building was proposed to occupy about 1,400 square feet. On the  
5 lower floor Weinberg proposed covered parking of approximately 400 square feet for two cars;  
6 and a carpentry area. The second floor was planned as the living area. The third floor would  
7 accommodate an elevator and further living area, to allow for about 2,000 square feet of living  
8 area. The elevator would be designed for his parents, who are quite elderly, his father being  
9 in a wheel chair. The total floor area of the house would be about 3,400 square feet.

#### 10 VIII

11 There is a two story house, located on the adjacent lot to the southwest of Weinberg.  
12 The house is closer than the 45 foot setback; however there was no evidence produced that it  
13 was built either after the adoption of the County shoreline setback line, or that it was  
14 authorized by a shoreline variance. To the south of that is an older cabin, which also is non-  
15 conforming to the shoreline setback line. Beyond that, to the southwest are lots which are  
16 devoid of structures, some of which are being used for recreational purposes. One of these has  
17 a small dock with a wooden bench for viewing the lake. The two lots between Weinberg and  
18 the Owners' Association property are in common ownership and are vacant. There are  
19 between 7 and 10 residential structures on the lake that are forward of the 45 foot setback line,  
20 however none of these were proven to have received permission under the SMA.

#### 21 IX

22 If the Weinberg house and deck were located as proposed, there would be some  
23 blockage of views of the lake from the properties to the northeast of the site, including the  
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1 Owners' Association property, and from the northeast side of the residence on the lot adjacent  
2 to and southwest of Weinberg.  
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#### 4 X

5 The site plan submitted to Ecology, for the Weinberg project, did not include the  
6 location of the domestic sewage system. Weinberg separately has received approval from the  
7 County Health Department for a septic tank and drainfield system on lot 70, adjacent to and  
8 above his lake front lot. His brother has considered allowing an easement for locating this  
9 system on their jointly owned lot, or for allowing an easement for a line to pump the sewage  
10 to lot 3, above the County road, where Weinberg owns a lot for which he has also received  
11 County approval for a septic tank and drainfield system, albeit for a different residential  
12 structure.

#### 13 XI

14 County zoning would allow Weinberg to locate a single-wide modular structure, which  
15 is about 12 feet wide, on the lot. It would permit, as a conditional use, a private, non-  
16 commercial dock or float on the property.

#### 17 XII

18 Any conclusion of law deemed to be a finding of fact is hereby adopted as such. From  
19 these findings of fact, the Board issues these.

### 20 CONCLUSIONS OF LAW

#### 21 I

22 The Board has jurisdiction over this shoreline variance permit RCW 90.58 180  
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27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
SHB NO. 93-2

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## II

Weinberg, having appealed the County's denial of a shoreline variance, bears the burden of proof before the Board. RCW 90.58.140(7)

## III

Variances are designed as escape valves from imperfect land use ordinances. 3 R. Anderson, (1986). This mechanism allows governmental entities to avoid application of a land use restriction, which literally applied, would deny a property owner all beneficial use of the property. Id. at sec. 20.02.

## IV

Variances are exceptions to the rule. The SMA is to be liberally construed on behalf of its purposes. RCW 90.58.090: Clam Shacks v. Skagit County, 109 Wn.2d 91, 93, 743 P 2d 265 (1987). Concomitantly, exceptions to its regulations must be strictly construed. See Mead School Dist. v. Mead Education, 85 Wn.2d 140, 145, 530 P.2d 302 (1975) (holding that the liberal construction command of the Open Public Meetings Act implies an intent that the act's exceptions be narrowly confined).

## V

The County variance criteria are generally as restrictive as those of Ecology. Under WAC 173-14-155, the Board applies the most restrictive criteria to the project. Strand v. Snohomish County, SHB No 85-4 (1985).

## VI

Section 8.5 of the WCSMP points out that the circumstances under which variances may be granted is strictly limited.

Variances shall be granted only under the following circumstances . . . where there are extraordinary or unique circumstances relating to the property such that the strict

1 implementation of this program would impose unnecessary hardships on the applicant  
2 or thwart the policies set forth in RCW 90 58.020.

### 3 VII

4 The variance criteria contained in the WCSMP, which must be satisfied, require a  
5 showing:

- 6 A. That the strict application of the bulk or dimensional criteria set forth in this  
7 program precludes or significantly interferes with a reasonable permitted use of  
8 the property.
- 9 B. That the hardship described in A. above is specifically related to the property,  
10 and is the result of unique conditions such as irregular lot shape, size, or natural  
11 features and the application of this program, and not, for example, from deed  
12 restrictions of [sic]<sup>1</sup> the applicant's own actions.
- 13 C. That the design of the project will be compatible with other permitted activities  
14 in the area and will not cause adverse effects to adjacent properties or the  
15 shoreline environment.
- 16 D. That the variance authorized does not constitute a grant of special privilege not  
17 enjoyed by the other properties in the area, and will be the minimum necessary  
18 to afford relief.
- 19 E. That the public interest will suffer no substantial detrimental effect.

20 In addition, the WCSMP mandates that:

21 In the granting of all variances, consideration shall be given to the cumulative  
22 environmental impact of additional requests for like actions in the area. For example,  
23 if variances were granted to other developments in the area where similar circumstances  
24 exist, the total of the variances should also remain consistent with the policies of RCW  
25 90.58.020 and should not produce significant adverse effect to the shoreline  
26 environment.

27 WCSMP, sec. 8.5 4.

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28 <sup>1</sup> This appears to be a typographical error. The Ecology criteria from which this  
29 language was derived, utilizes the word "or," instead of "of". If it is not a typographical  
30 error, Ecology's language, which would be more restrictive, controls. WAC 173-14-155.

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VIII

We conclude that Weinberg has failed to satisfy any of the above criteria.

IX

The WCSMP defines the Rural Shoreline Area as "an area developed at a low overall density or used at a low to moderate intensity including but not limited to residences, agriculture and outdoor recreation developments" (Emphasis added). WCSMP, sec. 3.4.3(a). Weinberg would not be denied a reasonable use of his property, by denial of the variance. He proposes to build a three-story structure to accommodate him and his elderly mother and ailing father. These needs are personal to Weinberg and his family. They do not provide a basis for intensifying the development on this Rural Shoreline Area. The evidence revealed that a much smaller, cabin-like dwelling, would be more in keeping with the shoreline environment that the County sought to protect when it developed the master program. We also note that many of the lots on the lake are without residences, and are being used for purely recreational purposes. In either event, under the facts of this case, Weinberg is left with a reasonable use of the property. Finally, Weinberg and his brother bought the adjacent, upland lot, shortly after this lot was purchased. Weinberg attempted to show that he could utilize that lot, or another lot he owns nearby for sewage disposal. He failed, however, to demonstrate that he could not utilize that lot for building the residence he desires.

X

Weinberg is knowledgeable about the shoreline restrictions. He has, in the 13 years he has resided in the vicinity, acquired over 25 properties near the lake. He has been aware of sales of property over a considerable time. It appears that he bought this undersized lot, knowing the risk inherent in obtaining a variance from the WCSMP restrictions. We do not believe that the SMA should be interpreted to countenance this manner of avoiding the act's

1 restrictions. The proper way to change the strict limitations of a master program, is through  
2 the orderly process of an amendment to the master program. The principle that the act's  
3 exceptions be narrowly construed, compel a conclusion that one who purchases a shoreline lot  
4 with, the express purpose in mind of obtaining a shoreline variance, does not do so with  
5 reasonable expectations. To condone such a practice, over time, would simply undermine the  
6 restrictions of the master program, on an ad hoc, piecemeal, as opposed to rational, planned  
7 basis. This situation is readily distinguishable from the situation where an owner of property  
8 finds that its property is subsequently restricted by the SMA or a master program, in such a  
9 way as to preclude that owner from beneficial use of the property. That owner does have  
10 reasonable expectation of obtaining a variance from the restrictions.

## 11 XI

12 A purchaser of land with knowledge of zoning restrictions is not qualified to receive a  
13 variance which relieves him of such restrictions. 3 R. Anderson, American Law of Zoning  
14 3d, sec. 20.58 (1986).

15 A person who purchases land with knowledge, actual or constructive of the zoning  
16 restrictions which are in effect at the time of such purchase is said to have created for  
17 himself whatever hardship such restrictions entail

18 Montgomery v Board of Zoning Adjustments of New Orleans, 488 So 2d 1277 (La. 1988);  
19 Accord, Giannattasio v Ganser, 570 N.Y S.2d 680 (1991); Bishop v. Eliot, 529 A.2d 798  
20 (Me. 1987); Merrihue v St. Charles Parish Planning & Zoning Dept., 496 So.2d 1232 (La.  
21 1986); Johnson v Robinson, 309 N.W.2d 526 (Mich. 1984); Board of Adjustment of  
22 Enterprise, 414 So.2d 123 (Ala. 1980); Abel v Zoning Board of Appeals of City of Norwalk,  
23 374 A.2d 227 (Conn. 1977); Goslin v Zoning Board of Appeals of City of Park Ridge, 351  
24 N.E.2d 299 (Ill. 1976), Glickman v Parish of Jefferson, 224 So.2d 141 (La. 1969)

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27 FINAL FINDINGS OF FACT.  
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SHB NO. 93-2

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## XII

In some cases, courts have held that the purchase of a lot with knowledge, actual or constructive of zoning restrictions, while not alone sufficient to justify denial of a variance, is a factor to be considered in the ultimate decision. Hanson v. Zoning Bd. of Appeals, 552 N.Y.S.2d 142 (1990); Stengel v. Woodstock Zoning Bd. of Appeals, 547 N.Y.S.2d 961 (1989); Four M Constr. Corp. v. Fritts, 543 N.Y.S.2d 213 (1989); Price v. Bensalem Township Zoning Hearing Bd., 569 A.2d 1030 (Pa. 1990); Iannucci v. Casey, 527 N.Y.S.2d 834 (1988); Byron Associates, Inc. v. Zoning Bd. of Appeals, 531 N.Y.S.2d 11 (1988); Human Dev. Services, Inc. v. Zoning Bd. of Appeals, 499 N.Y.S.2d 927 (1986).

## XIII

Finally, some jurisdictions do not recognize the purchase of a restricted piece of property as comprising a self-created hardship. City of Coral Gables v. Geary, 383 So.2d 1127 (Fla. 1980); Landmark Universal, Inc. v. Pitkin County Board of Adjustment, 579 P.2d 1184 (Colo. 1978), and Fair v. LaPorte City v. Board of Zoning Appeals, 355 N.E.2d 455 (Ind. 1976).

## XIV

The Washington appellate courts have not considered the precise issue of whether purchase, with actual or constructive knowledge of a shoreline restriction constitutes a self-created hardship. Likewise, there are no appellate decisions directly on point, in regard to zoning restrictions. In Lewis v. Medina, 87 Wn.2d 19, 23, 548 P.2d 1093 (1976), however, the Supreme Court found a self-imposed hardship; where two sons had inherited property from their mother, and had participated in the original conveyance of land, which reduced the remaining property below the minimum lot size.

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XV

We are unpersuaded that there is any substantial difference between the expectations of the person who had constructive knowledge that its participation as a seller in a conveyance of part of his property would leave that person with a substandard-sized lot in the remainder; and the person who purchases a non-conforming property. Both parties are presumed to have knowledge of existing land use restrictions.

XVI

The Board followed the Medina, rationale in Wiswall v. Clark County, SHB No. 90-37 (1991). There, the owner deeded a way property, leaving himself a lot upon which he could not meet the shoreline setback. In a later decision, in a split-decision, the Board rejected the concept that a purchaser of a substandard could be denied a variance on the basis of self-imposed hardship. Hoschek v. Mercer Island, SHB No. 91-42 (1992), reversed (on other grounds) Mercer Island v. Hoschek, King County Superior Court. No. 93-2-02514-9, oral opinion, (September 8, 1993).

XVII

Based on the facts of this case, we do not regard Hoschek as controlling. We believe the better rule, under the SMA, is that the purchase of property restricted under the SMA, may qualify as a self-imposed hardship.

XVIII

We need not decide this case solely on that ground. As stated earlier, the variance does not satisfy any of the other criteria under the WCSMP.

XIX

The third criterion, relates to the design of the project and potential adverse effects to adjacent properties or to the shoreline environment. Design is defined generally as: "a mental

1 project or scheme in which means to an end are laid down: plan;" and more specifically as: "a  
2 preliminary sketch or outline (as a drawing on paper or modeling in clay) showing the main  
3 features of something to be executed. DELINEATION". Webster's Third New International  
4 Dictionary 611 (1971).

## 5 XX

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7 Weinberg submitted only outline sketches of the outer dimensions of the structure. He  
8 failed to submit, with his shoreline application, the location of the proposed septic tank and  
9 drainfields, as required under WAC 173-14-110(11)(a)(10). Nevertheless, the design of the  
10 project, under either of the above definitions, presents a proposal which is out of scale with  
11 any structures permitted under the SMA. Indeed, Weinberg did not identify any structures on  
12 Emerald Lake which had received permits under the SMA. A three-story single family  
13 residence, proposed to be built 15 feet from the water's edge is not compatible with the  
14 objective of the Rural Shoreline Area to maintain a low overall density.

## 15 XXI

16 The fourth criterion requires that the project not constitute a grant of special privilege,  
17 and be the minimum necessary for relief. If approved, the Weinberg proposal would be the  
18 first of its kind approved on Emerald Lake under the SMA. As such, the granting of variance  
19 for it would constitute the granting of a special privilege, not enjoyed by other properties in  
20 the area. It is also, not the minimum necessary for relief. A much smaller residential  
21 structure, in the nature of a cabin, or a single-wide modular structure, could be located on the  
22 site, with much less intrusion.

## 23 XXII

24 Next, we conclude that the proposed variance, if granted, would cause the public  
25 interest to suffer substantial detrimental impact. To allow the variance would amount to an ad  
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2 hoc erosion of the low density rural-recreational character of Emerald Lake. It is that  
3 character which the County sought to preserve in adopting its master program. If there is to  
4 be a change to the vision for Emerald Lake, it should originate in an amendment to the master  
5 program. not in the approval of an individual project such as this.

## 6 XXII

7 Finally, Weinberg failed to prove that this proposal would not have a cumulative  
8 adverse environmental impact on the shoreline environment. There are several lots to the  
9 southeast of Weinberg which are currently undeveloped with structures. The waterfront depths  
10 on these lots do not appear sufficient to accommodate the minimum lot size (12,500 square  
11 feet), the 45 foot setback, and the distance of the drainfield from the ordinary high water mark  
12 (75-100 feet). WAC 246-272-100 and 246-272-140. No evidence was introduced to establish  
13 that the upland lots were owned in common with the waterfront lots.

## 14 XXIII

15 Any finding of fact deemed to be a conclusion of law is hereby adopted as such. From  
16 the foregoing, the Board issues this:

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**ORDER**

The County's decision to deny Weinberg a shoreline variance is affirmed.

DONE this 15<sup>th</sup> day of December, 1993

**SHORELINES HEARINGS BOARD**

  
ROBERT V. JENSEN, Presiding Officer

  
RICHARD C. KELLEY, Member

  
BOBBI KREBS MCMULLEN, Member

  
MIKE MORTON, Member

(See Concurring Opinion)  
MARK ERICKSON, Member

S93-2F

1 CONCURRING OPINION

2  
3 I concur with the result, but dissent from Conclusions of Law XI through XVIII.

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7 MARK ERICKSON, Member  
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